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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
BROWN COMMUNICATIONS)
)
Licensee of Radio Station)
WKIJ(AM),)
Parrish, Alabama)
)
Order to Show Cause Why the)
License for Station WKIJ(AM),)
Parrish, Alabama, Should)
Not be Revoked)

MM DOCKET NO. 92-35

ORIGINAL
FILE

To: Administrative Law Judge
Richard L. Sippel

**MASS MEDIA BUREAU'S PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW**

Respectfully submitted,
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September 4, 1992

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Summary

1. Brown Communications ("Brown"), licensee of WKIJ(AM), Parrish, Alabama, was ordered to show cause why its license should not be revoked. Commission records show that WKIJ(AM) has been silent without Commission authority since January 21, 1991.

2. It is concluded that Brown's license for WKIJ(AM) should be revoked. WKIJ has been silent since June 24, 1990. Pursuant to Brown's request of June 25, 1990, the Commission granted authority for WKIJ to remain silent until October 9, 1990. On October 8, 1990, the Commission granted Brown's request for an extension of WKIJ's authority to remain silent. Permission to remain silent until January 21, 1991, was given. No further requests for authority to remain silent have been filed, although WKIJ(AM) is silent.

3. It is immaterial that Brown has sought, and received, temporary authorization to conduct field tests. Similarly, the Commission's freeze on the filing of AM applications is not relevant. Finally, it is of no moment that Brown did not receive two letters from the Commission. One did not concern authority to remain silent, and the second was sent to Brown's address of record. A licensee is required to maintain a current address of record and to ensure that mail is received at the address.

4. Brown has wilfully violated §§ 73.1740 and 73.1750 of the Commission's Rules. Thus, it is not qualified to be or remain a Commission licensee.

**MASS MEDIA BUREAU'S PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW**

Preliminary Statement

1. By Order to Show Cause and Hearing Designation Order, 7 FCC Rcd 2135 (1992), the Commission directed Brown Communications ("Brown") to show cause why its license for Station WKIJ(AM) should not be revoked at a hearing upon the following issues:

(a) To determine whether Brown has violated §§ 73.1740 and/or 73.1750 of the Commission's Rules.

(b) To determine, in light of the evidence adduced pursuant to the foregoing issue, whether Brown is qualified to be and remain the licensee of Station WKIJ(AM).

2. The burden of proceeding with the introduction of evidence and the burden of proof with respect to the issues set forth above were placed upon the Mass Media Bureau. Order to Show Cause, supra. A hearing session was held on June 29, 1992, whereupon the record was closed. See Order, FCC 92M-736, released July 1, 1992.

Proposed Findings of Fact

3. The Commission issued the Order to Show Cause because the Commission's records indicate that WKIJ(AM), Parrish, Alabama, has been off the air without Commission authorization since January 21,

1991. By letter dated June 25, 1990, Jimmy D. Brown ("Mr. Brown"), Brown's general partner, informed the Commission that WKIJ(AM) had gone silent the previous day. Mass Media Bureau Exhibit (hereinafter "MMB Ex.") 1, Brown Communications Exhibit No. (hereinafter "Brown Ex.") 7; Tr. 149, 230. Mr. Brown asked for permission for the station to remain silent "until we, Brown Communications can restructure (sic) our finances, and or sale (sic) WKIJ." MMB Ex. 1. At that time, technical modifications were not contemplated by Brown. Tr. 231. On July 9, 1990, the Commission granted WKIJ(AM) temporary authority to remain silent until October 9, 1990. The Commission indicated that any request for extension of the granted authority must be accompanied by a detailed report of specific steps taken to resume operation. MMB Ex. 2. By letter dated October 8, 1990, Mr. Brown asked for an extension of WKIJ(AM)'s authority to remain silent. The letter stated that "as of this writing no qualified buyer has been obtained for WKIJ Radio. A 1kw AM daytime only there is no market (sic)." The letter went on to observe that, on October 5, 1990, WKIJ was notified that the land lease for its transmitter site had expired, and would not be renewed. Thus, the letter indicated, a request for authority to construct a test tower would be filed "with the Field Test Division Mass Media Bureau" to enable Brown to relocate its tower on its own property and increase power to 5kw. Further, the letter stated that a request for a waiver of "the freeze on the AM band" would also be filed, with a target date for that filing of October 15, 1990. MMB Ex. 3.

4. By Order released March 29, 1990, 5 FCC Rcd 2136 (1990), the Commission had imposed a freeze on the acceptance of applications for new AM stations or for changes in existing AM stations. Several exceptions were set forth, including applications for minor changes necessitated by such causes beyond the applicant's control as the unavoidable loss of a transmitter site. MMB Ex. 18. Mr. Brown testified that WKIJ could not make use of this exception because the only way for it to comply with coverage requirements from the new proposed site was to undertake a major change. Tr. 206, 225. The major change to increase power would make the station more marketable. Tr. 225. Although Brown had indicated its intention to seek a waiver of the freeze on or about October 15, 1990, no application to change WKIJ's facilities has been filed since 1986. MMB Ex. 17; Tr. 220, 230.

5. In response to Brown's October 8, 1990, letter, the Commission extended WKIJ(AM)'s authority to remain silent, pointing out, once again, that any further request must be accompanied by a progress report. The Commission's letter stated that WKIJ's authority to remain silent would expire on January 21, 1991. MMB Ex. 4. On November 9, 1990, Brown asked the Commission for permission to undertake field test measurements to determine ground conductivity.¹ Brown Ex. 2 at p. 3; Brown Ex. 3 at Pp. 2-3.

¹ Mr. Brown's letter also mentions the AM freeze, but the freeze clearly did not apply to field tests.

Special field test authorization was granted on November 18, 1990, to expire on February 28, 1991. MMB Ex. 5. By letter of April 25, 1991, Mr. Brown asked for a ninety day extension to conduct more field strength measurements, indicating that rain had hampered testing. The letter stated: "We believe that if we can get a few days of good dry weather conditions these test (sic) can be concluded and a (sic) application filed within ninety (90) days". MMB Ex. 6. Referencing the April 25, 1991, letter, the Commission granted the requested field test authority extension on May 16, 1991, to expire on August 31, 1991. Therein, the Commission stated: "You are cautioned to more closely observe the expiration dates of temporary authorizations." MMB Ex. 7. On August 16, 1991, Mr. Brown again wrote to the Commission. This time, he asked for an indefinite extension, until the AM freeze was lifted, because "Special Field Test to determine soil conductivity to relocate transmitter site is a major change to existing station."² This letter bears no letterhead, and is apparently addressed to the Federal Communications Commission, P.O. Box 351890, Pittsburgh, PA. 15251-5190. The letter's first sentence reads: "Ref. 8910-MB Brown Communications Radio Station WKIJ AM Route 10, Box 138, Jasper, Alabama 35501". MMB Ex. 8. By letter dated August 29, 1991, the Commission responded, indicating that the temporary authority for special field test would not be extended unless Brown submitted a status report on its progress. That letter was addressed to Jimmy D. Brown, at "Route 10, Box 351890, Pittsburg

² This assertion is inaccurate.

(sic), Pennsylvania 15251-5190." MMB Ex. 9. Mr. Brown did not receive the letter. MMB Ex. 13, at p. 1; Brown Ex. 6, at p. 2; Tr. 175, 177-78. He did not inquire as to the Commission's resolution of his request, but assumed it had been approved. Tr. 207, 217-18, 239, 242-43.

6. By letter dated June 24, 1991, the Commission asked Brown to submit information concerning its compliance with §§ 73.1740 (Minimum Operating Schedule), and 73.1750 (Discontinuance of Operation). MMB Ex. 10. According to Mr. Brown, he did not receive the letter, and, thus, did not respond. MMB Ex. 13, at p.1; Brown Ex. 6, at p. 3; Tr.179-81. The Commission's June 24, 1991, letter was addressed to Brown Communications at 314 Highway 78 By-Pass, Jasper, Alabama 35501. MMB Ex. 10. This was the address which Brown had specified in its most recent request for a change in its official mailing address, filed December 5, 1988. MMB Ex. 11. Brown's next request for a change in its official mailing address was filed in the above-captioned docketed proceeding, on April 27, 1992. The address given there is 4002 McIngvale Road, Hernando, Mississippi 38632. MMB Ex. 14. As recently as April 28, 1992, and May 21, 1992, Mr. Brown has received mail sent to the Highway 78 By-Pass address. MMB Exs. 15 and 16; Tr. 180-81. Postal authorities have forwarded mail bearing this address to Route 10, Box 138, in Jasper Alabama, where Mr. Brown has received it. Brown Ex. 1, at Pp. 3, 7. Similarly, mail addressed to Box 1332, Jasper, Alabama 35501, has been forwarded to

Route 10, Box 138, and Brown has received it. Brown Ex. 1, at Pp. 4, 5, 6, 9; Tr. 180-81. In response to specific correspondence bearing that address, the Commission has addressed mail to Brown at Box 1332, Jasper, Alabama 35501. MMB Exs. 1, 2, 4, 5, 6; Brown Ex. 2, at p.3; Brown Ex. 3, at p. 2.

7. Effective April 19, 1992, the Commission lifted the freeze on AM applications. MMB Ex. 19. Brown has not filed an application to change its facilities. MMB Ex. 17; Tr. 220, 230. Mr. Brown testified that such an application is not yet complete, although nearly so. Tr. 208, 228. WKIJ(AM) is still silent. Tr. 220, 230.

8. Mr. Brown testified that he and his family worked hard to keep WKIJ(AM) operating. He stated that Brown's lease then ran out and he decided to go silent in order to effect a power increase. Mr. Brown alluded to questions received during sales calls regarding the strength of WKIJ's signal. Mr. Brown also indicated that locating the studio and the transmitter on land which he had purchased outside of Jasper would reduce operating costs. He stated that Brown could not file an application to put this plan into effect because of the Commission's freeze on the filing of AM applications. Mr. Brown testified that he was not aware that WKIJ(AM) was silent illegally until he was notified by a consulting engineer that the station was one of several whose licenses were to be revoked. Brown Ex. 9, at p. 2; Tr. 143, 202-03, 207, 217-18,

Conclusions of Law

1. Section 73.1740(a)(4) of the Commission's Rules provides:

In the event that causes beyond the control of a licensee make it impossible to adhere to the operating schedule of this section or to continue operating, the station may limit or discontinue operation for a period of not more than 30 days without further authority from the FCC. Notification must be sent to the FCC in Washington, D.C. no later than the 10th day of limited or discontinued operation. During such period, the licensee shall continue to adhere to the requirements in the station license pertaining to the lighting of antenna structures. In the event normal operation is restored prior to the expiration of the 30 day period, the licensee will so notify the FCC of this date. If the causes beyond the control of the licensee make it impossible to comply within the allowed period, informal written request shall be made to the FCC no later than the 30th day for such additional time as may be deemed necessary.

Since June 25, 1990, WKIJ(AM) has been silent. Thus, Brown Communications failed to adhere to any operating schedule for WKIJ(AM). Moreover, Brown has effectively discontinued operation of WKIJ(AM). In this regard, and for the reasons which follow, it is concluded that Brown has wilfully violated § 73.1740.

2. First, it is concluded that Brown has violated § 73.1740 because it is clear that its silence has not been the result of causes beyond Brown's control. Brown's earliest correspondence on the subject of its silence makes clear that Brown has voluntarily

chosen to silence WKIJ(AM). The loss of its transmitter site, whether or not it is deemed unavoidable, was not the cause. By Brown's own admission, it was not notified that its lease would not be renewed until October 5, 1990, three months after WKIJ(AM) ceased operation.

3. Secondly, the Commission last granted WKIJ(AM) authority to remain silent until January 21, 1991. Since then, the station has been silent without Commission authority. Brown did not seek an extension of the authority to remain silent. To the extent that Brown may have sought permission to conduct field tests, this fact is irrelevant. The two authorizations are not the same, as Brown recognizes when it discusses plans to separately seek field test authorization in correspondence dealing with authority to remain silent. For this reason, it is immaterial that Brown did not receive the Commission's letter denying his final request for field test authorization. The Commission's freeze on the filing of AM major change applications is similarly without moment. There is no indication that Brown pursued the possibility of restoring operation by means short of a major change. Indeed, it is clear that the contemplated major change was designed to increase the value and marketability of WKIJ, not to return it to the air.

4. Even the oft-cited major change application is nothing more than a vague promise. In April, 1991, Brown anticipated that an application would be ready within ninety days. At the hearing

in the above-captioned proceeding, Mr. Brown was still indicating that the application was nearly complete. The fact is that WKIJ(AM) has discontinued operation; yet, Brown has failed to surrender its license for cancellation, as required by § 73.1750 of the Commission's Rules. Section 73.1750 provides:

The licensee of each station shall notify the FCC in Washington, D.C. of permanent discontinuance of operation at least two days before operation is discontinued. Immediately after discontinuance of operation, the licensee shall forward the station license and other instruments of authorization to the FCC, Washington, D.C. for cancellation.

5. Rather than make the frequency available to a licensee willing to operate it, Brown has chosen to stall. In so doing, it has wilfully violated § 73.1750.

6. To mitigate its conduct, Brown has cited the hard work which the Brown family has devoted to WKIJ(AM). Without disputing this fact, it is insufficient to mitigate Brown's rule violations. Moreover, Brown's early correspondence suggests a desire to sell WKIJ. In addition, the Brown family's hard work notwithstanding, Brown has shown a propensity to be cavalier regarding Commission requirements. Indeed, the Commission has cautioned Brown about its failure to closely observe deadlines.

7. Furthermore, Brown's failure to comply with the Commission's rules is not mitigated by its nonreceipt of Commission correspondence. For the reasons discussed above, the

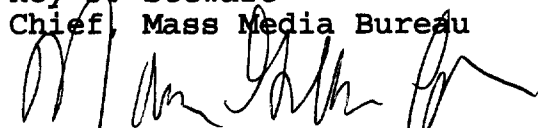
correspondence is irrelevant to Brown's authority to remain silent. In this regard, it is not accurate to say that Mr. Brown learned that WKIJ was silent without Commission authority when the Order to Show Cause was issued. Mr. Brown knew that permission to remain silent expired on January 21, 1991. Thereafter, Brown did nothing, though Mr. Brown knew that the station remained silent. The Commission's operating requirements are clear, as is the fact that it is the licensee's responsibility to comply with them. To the extent that Mr. Brown assumed that permission to remain silent existed, the assumption was not reasonable. And, to the extent that Mr. Brown expected the Commission to alert him to the fact that it was aware of a rule violation, the expectation is preposterous. It is precisely this attitude which illustrates the wilfulness of Brown's misconduct. It is not necessary for the Commission to conclude that a licensee knew its acts were wrongful. It is sufficient to find that the acts were not accidental, and wilfulness has been found where a licensee's behavior was caused by indifference, lack of concern, or laxity. Midwest Radio-Television, Inc., 45 FCC 1137, 1141 (1963).

8. Moreover, a licensee cannot be allowed to evade responsibility for its actions because it did not receive correspondence when the correspondence was mailed to the licensee's address of record, as was the case with one Commission letter not received by Brown. Section 1.5 of the Commission's Rules makes clear that it is the licensee's responsibility to ensure that

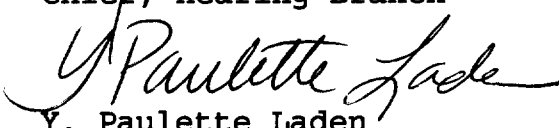
Commission correspondence mailed to the address of record is received, and that the address of record is correct³.

9. For the reasons set forth in the foregoing Conclusions of Law, it is ultimately concluded that Brown is not qualified to be or remain a Commission licensee. Accordingly, its license for WKIJ(AM) should be revoked. In view of this action, a forfeiture need not be imposed.

Respectfully submitted,
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³ Although some correspondence has been received at Brown's address of record, it appears that the address in question had changed, unbeknownst to the Commission.

CERTIFICATE OF SERVICE

Michelle C. Mebane, a secretary in the Hearing Branch, Mass Media Bureau, certifies that she has on this 4th day of September, 1992, sent by regular United States mail, U. S. Government frank, copies of the foregoing "Mass Media Bureau's Proposed Findings of Fact and Conclusions of Law" to:

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